

**Unified Amnesty Policies: A Hope for Removing
the Fear of Reporting Sexual Assault on College
Campuses**

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I. INTRODUCTION

A young college student signs an honor code at a religious university. She pledges to refrain from drinking alcohol and taking drugs, and to abstain from consensual sex outside marriage. However, one night down the road she finds herself in a situation where she has willfully broken one of these policies by taking LSD. If the school finds out about her taking LSD, she faces suspension and potentially expulsion. That same night, however, she finds herself face-to-face with something even more dangerous than LSD, a sexual predator coercing her against her will.

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This young woman is then faced with a difficult dilemma: does she report the assailant and risk the school finding out about her drug use? After all, she could be suspended or expelled as a result. This could potentially have a damaging effect on her standing with her religion, family, and even future job prospects. But, he raped her. He violated her human dignity.

This young woman, Brooke, took the risk and reported the student.¹ Brooke was a student at Brigham Young University (BYU), a school owned and operated by the Church of Jesus Christ of Latter-day Saints, at the time of the incident described above.² She reported the assailant, another BYU student, to the university's Title IX Office only to discover that making such a report resulted in her punishment from the university.³ Just a few months after reporting the assault, she received a letter from the university stating, "You are being suspended from Brigham Young University because of your violation of the Honor Code . . . effective immediately."⁴

Brooke was not alone in this treatment while at BYU. Many have come forward,⁵ including another student, Madi, who was so worried to report to the university that she was raped in her off-campus apartment that she reported the

¹ Jack Healy, *At Brigham Young, a Cost in Reporting a Rape*, N.Y. TIMES (Apr. 26, 2016), http://www.nytimes.com/2016/04/27/us/rape-victims-brigham-young-university-honor-code-suspensions.html?_r=0 (on file with *Ohio State Law Journal*). The *New York Times* piece was not the only coverage of Brooke's story and others like it. Stories like those of Brooke and Madi became national news and were covered by almost every major news outlet. See, e.g., Associated Press, *BYU Students Investigated for Breaking Conduct Code After Reporting Rape*, FOX NEWS (Apr. 21, 2016), <http://www.foxnews.com/us/2016/04/21/byu-students-investigated-for-breaking-conduct-code-after-reporting-rape.html> (on file with *Ohio State Law Journal*); Ana Cabrera & Sara Weisfeldt, *Punished After Reporting Rape at Brigham Young University*, CNN (Apr. 29, 2016), <http://www.cnn.com/2016/04/29/health/brigham-young-university-rape/> [<https://perma.cc/T2SU-TM7T>]; Molly Hennessy-Fiske, *Sexual Assault Survivors Find Themselves Under Suspicion at BYU*, L.A. TIMES (Mar. 17, 2016), <http://www.latimes.com/nation/la-na-byu-honor-code-20160512-snap-story.html> [<https://perma.cc/GG4S-WZVL>]; Dan Hernandez, *Rape Victim Could Be Punished Under Brigham Young University's 'Honor Code'*, GUARDIAN (Apr. 20, 2016), <https://www.theguardian.com/us-news/2016/apr/20/brigham-young-sexual-assault-victims-protests-honor-code> [<https://perma.cc/3EWJ-P4Z5>]; Yanan Wang, *Brigham Young University Under Fire for Disciplining Sexual Assault Victim for 'Honor Code' Breach*, WASH. POST (Apr. 20, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/20/brigham-young-university-under-fire-for-disciplining-a-sexual-assault-victim-for-honor-code-breach/?utm_term=.06333387a14 [<https://perma.cc/P4PT-8JXQ>].

² Healy, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ See Alex Stuckey & Matthew Piper, *'I Thought I Was the Only One': BYU Protestors Say They've Been Shamed by Honor Code Practices, Demand Change*, SALT LAKE TRIB. (May 11, 2016), <http://www.sltrib.com/news/3799848-155/i-thought-i-was-the-only> [<https://perma.cc/P289-DHAC>]. After Brooke and Madi's stories became national news, many other women also came out alleging they had been treated similarly at BYU after reporting a sexual assault. *Id.* Protestors walked through campus with the signatures of more than 90,000 people demanding that BYU change its policies to include an amnesty clause. *Id.*

rape to the Provo, Utah police.⁶ She recalls “sobbing and telling the police officer I couldn’t go forward because B.Y.U. was going to kick me out.”⁷ Madi’s report made its way to the university anyway through an acquaintance who works as a Utah County sheriff’s deputy that received the report from Madi’s assailant.⁸ Even though the deputy was charged with witness retaliation for turning over the report, the school still told Madi it was “under an obligation to itself and to its students to investigate credible reports of Honor Code violation[s].”⁹ While the school investigated Madi, she reported that she was not allowed to talk about the incident while the criminal case was still open.¹⁰ Even though she was unable to cooperate due to limitations beyond her control, the school blocked her from enrolling in any future classes until the Honor Code issues were resolved.¹¹ She never went back.¹²

Sexual assault involving college students is a national concern, and part of the concern is the underreporting of sexual assaults.¹³ Instead of encouraging the reporting of assaults, university policies can deter survivors or witnesses from coming forward.¹⁴ If school honor code offices treated all survivors as BYU treated Brooke and Madi, very few survivors would come forward if it meant being suspended or kicked out of school.

Even without stories such as Brooke’s and Madi’s becoming public, university policies may already deter students from coming forward and

⁶ Healy, *supra* note 1.

⁷ *Id.* Because of her fear of punishment from BYU, she waited four days to report the rape. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Healy, *supra* note 1.

¹³ Alia Wong, *Why the Prevalence of Campus Sexual Assault Is So Hard To Quantify*, ATLANTIC (Jan. 26, 2016), <https://www.theatlantic.com/education/archive/2016/01/why-the-prevalence-of-campus-sexual-assault-is-so-hard-to-quantify/427002/> [<https://perma.cc/95ZD-LCW3>] (“According to some statistics, sexual assault is virtually nonexistent at U.S. colleges and universities. . . . [T]he vast majority of colleges and universities in the U.S.—91[%]—reported zero incidents of rape last year. Few would doubt that these numbers seriously underestimate how often sexual assault happens in college.”).

¹⁴ See, e.g., Emma Sarra Webster, *Baylor University Punished Sexual Assault Victims for Drinking*, TEEN VOGUE (Aug. 1, 2016), <http://www.teenvogue.com/story/baylor-university-silenced-rape-sexual-assault-victims> [<https://perma.cc/FWD5-QX4J>] (“‘Amnesty is a no-brainer,’ Shan Wu, a former federal sex crimes prosecutor and current criminal defense attorney specializing in student legal issues, told the AP. ‘Unfortunately, these codes force students to engage in life-or-death calculations.’”).

reporting sexual assaults.¹⁵ BYU is not the only contributor to this problem.¹⁶ In a recent “Dear Colleague” letter, the U.S. Department of Education’s Office for Civil Rights encouraged colleges to create education programs aimed at encouraging students to report incidents of sexual violence to school and law enforcement authorities.¹⁷ However, the letter expressed concern that the current state of campus “disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.”¹⁸ National statistics support this concern. Aside from fears of facing campus discipline, sexual assault is already an underreported crime.¹⁹ Compared to the rest of the population, college-aged students are far less likely to report sexual assault.²⁰ Sexual assault is reported even less often by college-aged students that were

¹⁵ See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 15 (2011) [hereinafter DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/G9Wg-P2R8>] (“Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.”).

¹⁶ See Webster, *supra* note 14. The stories from Baylor echo those from BYU. *Id.* One anonymous student was served with an alcohol code violation and twenty-five hours of community service after telling the school that her drinking was a result of being raped the previous month. *Id.* The law firm investigating Baylor’s handling of assault violations recommended that the school revise its Title IX policies “to include a clear amnesty provision for violation[s] of the Sexual Conduct policy.” *Id.* Punishing survivors is not just a college problem either; it appears the same issues happen at high schools. See, e.g., Nora Caplan-Bricker, “My School Punished Me,” SLATE (Sept. 19, 2016), http://www.slate.com/articles/double_x/doublex/2016/09/title_ix_sexual_assault_allegations_in_k_12_schools.html [<https://perma.cc/HF6A-GVQ3>]; Kate Irby, *She Told Her High School She Was Sexually Assaulted. They Suspended Her for It.*, MIAMI HERALD (Sept. 21, 2016), <http://www.miamiherald.com/news/nation-world/national/article103142437.html> [<https://perma.cc/4XG3-J8EM>]; Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html?_r=0 (on file with *Ohio State Law Journal*).

¹⁷ DEAR COLLEAGUE LETTER, *supra* note 15, at 15 (“The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities.”).

¹⁸ *Id.*

¹⁹ It is estimated that only a little over 37% of assaults ever get reported to the police. NAT’L SEXUAL VIOLENCE RESOURCE CTR., FALSE REPORTING OVERVIEW 1 (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf [<https://perma.cc/9BYK-WRLW>].

²⁰ Of people ages eighteen to twenty-four, only 32% of nonstudent females report sexual assault to the police, while only 20% of female college students of the same age report sexual assault to police. *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> [<https://perma.cc/NAW9-ACXY>]. Some may argue the 12% difference between students and nonstudents is because students have other outlets to report sexual assaults, such as a Title IX office, but only 4% in the same study said they chose not to report to the police because they reported the assault somewhere else. *Id.*

under the influence of drugs and alcohol at the time of the assault.²¹ Thus, there is something—or many things—preventing college-aged survivors, particularly those survivors under the influence of drugs and alcohol at the time of the assault, from coming forward to report sexual assault.

The goal of the policy recommendations in this Note is not necessarily to increase reporting of sexual assault. Reporting a sexual assault is a decision that should be left entirely with survivors of assault. It is a highly personal decision and may subject survivors to the system in ways they may not want and may force them to relive their assault repeatedly.²² Rather, the goal of this Note is to remove one of the barriers survivors face when deciding to come forward. Because the decision to come forward to report an assault should be left with survivors, survivors should not be faced with additional barriers to holding their assailants accountable through the reporting process.²³

With the goal to remove barriers for reporting sexual assault, this Note suggests an approach to alleviate the fear students may have in reporting sexual assault by granting immunity to survivors and witnesses who were violating campus alcohol or drug policies at the time of the assault, or when the university discovers similar violations during a sexual assault investigation. Part II discusses additional background and barriers students currently face in reporting sexual assault. These barriers include personal barriers, such as personal shame, guilt, embarrassment, and fear of retaliation by their perpetrators.²⁴ These barriers also include institutional barriers that reduce survivors' confidence in

²¹ One study of two very large public universities found that just 2% of sexual assault survivors incapacitated by drugs or alcohol reported assaults to law enforcement. Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> [<https://perma.cc/RQ25-F63N>].

²² See JACK A. PANELLA, SUPERIOR COURT OF PA. SEXUAL VIOLENCE BENCHMARK ch. 1, at 31 (1st ed. 2011) ("Victims consistently report that testifying in court can be as traumatic as the original rape because they are forced to relive the rape mentally and emotionally."); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 182–84 (2010); see also Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332, 1335 (2000) ("Testifying is one of four significant predictors of post-traumatic stress disorder symptoms among adult survivors of child rape."). Thus, with the potential of facing increased trauma by reporting a sexual assault, the decision of whether or not to testify against a survivor's perpetrator is not straightforward. Therefore, the goal of this Note is not to make every survivor come forward. Rather, the goal is to remove barriers from survivors who may want to come forward and report but feel they cannot.

²³ See Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 161 (2006) ("Men and women in our study similarly perceive the importance of barriers to reporting rape. A careful design of treatment and intervention modalities, mindful of the persistent attitudinal barriers to their use, may help diminish barriers to reporting the crime of rape.").

²⁴ Mira S. Krivoshey et al., *Sexual Assault Reporting Procedures at Ohio Colleges*, 61 J. AM. C. HEALTH 142, 143 (2013); Sable et al., *supra* note 23, at 159.

the system.²⁵ Part III discusses current approaches that state governments and colleges are taking to address sexual assault reporting. This discussion includes approaches that colleges are taking to tackle similar issues, such as good Samaritan statutes that relieve college students of drug and alcohol infractions if they assist students at the time of an emergency. Part IV suggests an approach that Congress should take to ensure colleges are not punishing survivors who come forward to report assault or instilling fear in students that prevents them from coming forward. These recommendations include precise language for amnesty clauses and mandating separate office space and independent function for Title IX and university discipline offices. While amnesty clauses have been encouraged and passed,²⁶ this is the first time precise language has been suggested in law review literature to ensure these amnesty clauses are effective. Part V will include discussion of concerns that critics may have, including that these suggestions may incentivize students to falsely claim sexual assault to receive immunity from drug and alcohol infractions. Research regarding false reporting alleviates this concern. Finally, Part VI briefly concludes.

II. CURRENT BARRIERS TO REPORTING SEXUAL ASSAULT

Before discussing an approach to alleviate concerns students may have in reporting sexual assault, it is important to understand the current barriers survivors face in reporting. Because there are many barriers, the institutional reform I suggest in Part IV will not remove all the current barriers to reporting sexual assault. However, one of the last barriers students should face when deciding whether to report a sexual assault is receiving punishment from the colleges and universities they attend. It is also important to keep in mind that

²⁵ YALE WOMEN FACULTY FORUM, REPORT OF THE YALE UNIVERSITY WOMEN FACULTY FORUM COUNCIL ON SEXUAL MISCONDUCT AT YALE 20 (Oct. 2009), https://wff.yale.edu/sites/default/files/files/WFFReportonSexualMisconductatYale_000.pdf [<https://perma.cc/4B79-A2FR>] (“[Seven] out of [ten] students on college campuses, asked for their opinions on how their administration handles sexual assault complaints, say that they do not have confidence in the process or those who administer it.”).

²⁶ Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1033–35 (2015). Here, I recommend that campuses enact good Samaritan policies that protect students “without forcing [them] to risk facing penalties for choosing to help others.” *Id.* at 1034. Others suggest that these good Samaritan policies, or amnesty clauses, should provide protection to bystanders who participate in a wrongful act initially, but later intervene or act as whistle-blowers. *Id.*; see also Denise Balkissoon, *When We Talk About Consent, Appreciate the Rare Bravery of the Bystander*, GLOBE & MAIL (Jan. 23, 2015), <http://www.theglobeandmail.com/opinion/when-bad-things-happen-appreciate-the-bravery-of-the-bystander/article22600324/> (on file with *Ohio State Law Journal*) (accounting the story of a Canadian dental student who reported his group’s inappropriate and misogynistic use of Facebook, then was suspended along with the other group members). Some states have attempted to address this issue and have adopted forms of amnesty clauses, but these clauses because of their language will be inadequate in application. See, e.g., CAL. EDUC. CODE § 67386 (West Supp. 2018); MD. CODE ANN. EDUC. § 11-601 (LexisNexis Supp. 2017); N.Y. EDUC. LAW § 6442.1 (McKinney 2016); WIS. STAT. § 125.07(5) (West Supp. 2017).

even though the number of sexual assaults reported to authority is low, approximately 70% of sexual assault survivors tell somebody what happened.²⁷ Thus, survivors of sexual assault want to tell somebody about what took place but are choosing not to communicate with formal authorities.

A. Personal Barriers

Aside from institutional concerns, students have many personal reasons for choosing not to come forward to report sexual assault. For example, men and women have reported at high levels that shame, guilt, and embarrassment prevent them from coming forward to report a sexual assault.²⁸ Sadly, survivors also sometimes avoid reporting sexual assault out of fear of retaliation from their perpetrator.²⁹ This fear may stem from the fact that in 96% of sexual assaults, the offender is an acquaintance, classmate, significant other, friend, or in some other way known by the survivor.³⁰ Because so many offenders know or see the survivor on a regular basis, some survivors fear the many opportunities a perpetrator may have for revenge if the survivor comes forward.³¹ This problem is exacerbated by the shockingly lenient punishments those found responsible for sexual assault receive, with very few being expelled or suspended, leaving students to continue to walk the same halls as their perpetrators.³² If opportunities for revenge do not deter victims strongly enough, the

²⁷ Krivoshey et al., *supra* note 24, at 143 (“These numbers suggest that victims wish to share their experiences but are not communicating with formal authorities.”); see also Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, Article in 30 *Crim. Just. & Behav.*, SAGE JOURNALS, 6, 25 (Feb. 2003).

²⁸ Sable et al., *supra* note 23, at 159.

²⁹ Krivoshey et al., *supra* note 24, at 143.

³⁰ *Id.* (“This fear is rational as the perpetrator is most often known to the victim and may have the opportunity to enact revenge.”).

³¹ *Id.*; see also DEAR COLLEAGUE LETTER, *supra* note 15, at 16 (“Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates.”); Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=1 (on file with *Ohio State Law Journal*). In this account, a young woman reported that she was raped by three football players at a party. *Id.* While the school issued a “no contact” order against the accused, it took the school five months to find one of the accused responsible for breaking that order and did not tell the survivor whether or how he would be punished for violating the order. *Id.* That same survivor also faced threats and harassment from other members of the football team who were not involved in the investigation. *Id.*

³² See Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFPOST (Sept. 29, 2014), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [<https://perma.cc/MPV4-N53J>] (“Students found responsible for sexual assault were expelled in 30[%] of cases and suspended in 47[%] of cases . . . At least 17[%] of students received educational sanctions, while 13[%] were placed on probation, sometimes in addition to other punishments.”).

awkwardness, possible shame, and revictimization of seeing a reported assailant on a daily basis might.³³ It might seem easier to avoid reporting altogether.³⁴

Not to mention, survivors sometimes feel like if they report their assault, the system revictimizes them in the process, especially if they must face their perpetrator.³⁵ These situations can be traumatic for a survivor, forcing them to relive their assault repeatedly.³⁶ Rather than go through these potentially traumatic situations, some survivors would rather not report the assault and avoid some of the side effects that come with reporting.³⁷

B. Lack of Confidence in the System

One of the major concerns that survivors, particularly students, have when reporting sexual assault is a lack of confidence in the system.³⁸ This lack of confidence in the system may come from widespread reports of college campuses not believing or ignoring survivors of sexual assault.³⁹ One BYU survivor noted the most traumatic part about reporting her rape was the feeling

³³ Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAG. (Sept. 10, 2015), https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?_r=0 (on file with *Ohio State Law Journal*) (“It’s not abstract when you’re failing out of school because you have to share a library with your rapist.”).

³⁴ Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/> [<https://perma.cc/9T2E-UZGM>] (“I didn’t want to start an entire thing. I didn’t want that whole frat to have a backlash against me.”).

³⁵ See *supra* note 22; *infra* notes 47–49 and accompanying text (covering the ways in which survivors of sexual assault feel revictimized by the system if they choose to come forward to report a sexual assault).

³⁶ PANELLA, *supra* note 22, ch. 1, at 31 (“Victims consistently report that testifying in court can be as traumatic as the original rape because they are forced to relive the rape mentally and emotionally.”).

³⁷ *Reporting Sexual Assault: Why Survivors Often Don’t*, MCASA, <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf> [<https://perma.cc/E4K9-NAUY>] (“Not all survivors find it necessary to report sexual assault In fact, some feel that the criminal justice system re-victimizes them in its process.”).

³⁸ YALE WOMEN FACULTY FORUM, *supra* note 25, at 20 (“[Seven] out of [ten] students on college campuses, asked for their opinions on how their administration handles sexual assault complaints, say that they do not have confidence in the process or those who administer it.”).

³⁹ See Mary Beth Marklein & Deirdre Shesgreen, *Colleges Ignoring Sexual Assault, Senator Charges*, USA TODAY (July 9, 2014), <http://www.usatoday.com/story/news/nation/2014/07/09/claire-mccaskill-college-sexual-assault-report/12400401/> [<https://perma.cc/M3LT-4YFW>]; Stephanie Saul, *Raped at Off-Campus Frat Houses, Students Say, and Ignored by College*, N.Y. TIMES (Apr. 20, 2016), http://www.nytimes.com/2016/04/21/us/kansas-state-university-fraternity-rape-lawsuit.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article&_r=0 (on file with *Ohio State Law Journal*); Marisa Taylor, *Survey: 40 Percent of US Colleges Didn’t Investigate Any Sexual Assaults*, ALJAZEERA AM. (July 9, 2014), <http://america.aljazeera.com/articles/2014/7/9/campus-sexual-assaultsurvey.html> [<https://perma.cc/W9QL-HVLW>].

that the school did not believe her.⁴⁰ Another major concern students have is confidentiality, or fear of their report getting out.⁴¹ Madi's situation demonstrated the legitimacy of student confidentiality concerns.⁴² Because of an ineffective system, Madi's report made its way from the local sheriff's office to the school's Honor Code Office, which is how she ultimately ended up being disciplined by the school.⁴³ The passing of her report between the sheriff's office and the school was done entirely without her permission.⁴⁴ Madi's confidentiality was not much of a concern for the sheriff's office or the university,⁴⁵ and authorities may evince a similar lack of respect for other student-survivors' confidentiality.

An ineffective system that left Madi, Brooke, and so many others without relief reduces the confidence that students have in their universities to effectively handle allegations of sexual assault.⁴⁶ These ineffective systems leave survivors vulnerable to a "second rape" by their universities.⁴⁷ The term second rape "describes the experience of rape survivors who are denied protections and support from their communities, leaving them feeling 'blamed, doubted and re-victimized.'"⁴⁸ Rather than face a second rape from an ineffective system, some survivors would rather not report a sexual assault at all.⁴⁹

⁴⁰ Cabrera & Weisfeldt, *supra* note 1 ("For Madeline MacDonald, the worst part was feeling like the school didn't believe her.").

⁴¹ Gray, *supra* note 21 ("[R]esearch shows that college victims don't report sexual assault to the police because they don't want anyone to know."); Sable et al., *supra* note 23, at 159.

⁴² See Healy, *supra* note 1 (explaining that even though Madi went to the local police out of fear of BYU knowing what happened, her report made its way to BYU anyway).

⁴³ *Id.* (noting that it wasn't until BYU got ahold of the report she had made to the police that BYU investigated her conduct).

⁴⁴ *Id.* (noting that the report was passed from the man who had assaulted her, to an acquaintance at the police department, who then passed it on to the BYU Honor Code Office).

⁴⁵ See, e.g., Caroline McMullen, *FSU Accidentally Emailed Assault, Harassment and Other Complaints to 1600 Students*, TAB, <https://thetab.com/us/floridastate/2016/03/16/fsu-email-sent-students-1026> [<https://perma.cc/5T8V-ZM66>] (accounting an incident at Florida State University where the school accidentally sent confidential complaints to over 1600 students, some of which contained intimate accounts of harassment or assault).

⁴⁶ See Gray, *supra* note 21; Sable et al., *supra* note 23, at 159.

⁴⁷ See Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1240 (2001) ("When rape victims' needs are not addressed by the very organizations they turn to for assistance, the effects can be quite devastating. Secondary victimization . . . further[s] the rape event, resulting in additional trauma for rape survivors."); Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFPOST (Jan. 23, 2014), http://www.huffingtonpost.com/andrea-pino/the-second-rape_b_3655062.html [<https://perma.cc/T5MN-J8GY>].

⁴⁸ Moriah Silver, Essay, *The Second Rape: Legal Options for Rape Survivors To Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014).

⁴⁹ See Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 263, 267 (2006) ("For example,

C. Fear of Discipline

Lacking confidence in the system leads to the fear that many survivors have of facing discipline from their universities if they report their sexual assault to campus authorities.⁵⁰ The “Dear Colleague Letter” warned that campus sexual assault policies may have this effect, and the situations at BYU and other universities have proven this to be true.⁵¹ The fear of getting in trouble is why Madi first went to the local police rather than to her university to report the assault.⁵² Also, like college students nationwide, Brooke had experimented with drugs the night of her assault, which was in violation of BYU’s honor code.⁵³ It was this kind of behavior that led to Brooke’s suspension from BYU, even though the school would not have found out about her behavior had she not come forward and reported her assault.⁵⁴ Essentially, she was punished for coming forward.

This sort of reaction from universities is a problem considering the amount of sexual assaults that take place while students, either the perpetrator, the survivor, or both, are under the influence of drugs and alcohol.⁵⁵ About half of all sexual assaults involve situations in which the survivor, perpetrator, or both were consuming alcohol.⁵⁶ Additionally, sexual assaults are more likely to occur in places where alcohol is regularly consumed, such as at parties and bars.⁵⁷ Therefore, even if survivors are not drinking themselves, they may become survivors of assault in environments where drinking and consuming drugs

she described never even considering reporting the assault . . . ‘I just felt . . . that anybody would say, well, ah, you know, it was your own fault or you were vulnerable or, you know, not that you asked for it, but you were in that position, what did you expect, or something like that, you know. There was like, it’s not going to be any help. And, well, you just laid there, you know.’”).

⁵⁰ See DEAR COLLEAGUE LETTER, *supra* note 15, at 15 (“Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved. As a result, schools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.” (footnote omitted)).

⁵¹ *Id.*; see Healy, *supra* note 1 (explaining that Madi went to the local police out of fear of getting in trouble with BYU); Webster, *supra* note 14 (accounting Baylor University punishing students after they came forward to report sexual assaults).

⁵² Healy, *supra* note 1.

⁵³ *Id.*; see also *Sexual Assault and Alcohol: What the Research Evidence Tells Us*, MD. COLLABORATIVE TO REDUCE C. DRINKING & RELATED PROBS. (2016), <https://www.drugabuse.gov/sites/default/files/sexualassault.pdf> [<https://perma.cc/4LW3-GFX5>] (noting that about half of all sexual assaults on college campuses involve situations where the perpetrator, the survivor, or both were consuming alcohol).

⁵⁴ Healy, *supra* note 1 (explaining that it was not until Madi went to the police that BYU even found out about her violating the school’s honor code).

⁵⁵ *Sexual Assault and Alcohol*, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ *Id.*

regularly occurs. Potential perpetrators use these settings to find individuals that they can take advantage of.⁵⁸

III. CURRENT APPROACHES TO HANDLING THE ISSUE (AND SIMILAR ISSUES)

Currently, some universities and state legislatures have attempted to alleviate the fear that students have when it comes to coming forward and either seeking help as a survivor of sexual assault or reporting an incident as a witness.⁵⁹ Beyond the sexual assault context, many campuses have already implemented good Samaritan policies that shield students from campus punishment where they help another student seek medical attention as the result of an emergency.⁶⁰ This same idea can and should be applied to protect students who witness a sexual assault and report it to campus authorities. Some universities have taken the initiative and enacted amnesty clauses to lessen the fear its students may have of coming forward to report a sexual assault.⁶¹ This

⁵⁸ *Id.*

⁵⁹ See CAL. EDUC. CODE § 67386 (West Supp. 2018); MD. CODE ANN., EDUC. § 11-601 (LexisNexis Supp. 2017); N.Y. EDUC. LAW § 6442.1 (McKinney 2016); WIS. STAT. § 125.07(5) (West Supp. 2017). All of these state statutes include some form of amnesty clause to protect students from campus punishment if they report sexual assault. After coming under fire for its handling of sexual assault cases, BYU issued a report detailing its new policies that the school hoped would eliminate punishment students have received after reporting sexual assault. See BRIGHAM YOUNG U., REPORT OF THE ADVISORY COUNCIL ON CAMPUS RESPONSE TO SEXUAL ASSAULT 31 (Oct. 2016) [hereinafter BYU REPORT], <https://news.byu.edu/sites/default/files/AdvisoryCouncilReport.pdf> [<https://perma.cc/K4E4-MVF7>]; see also P'ship News Serv. Staff, *Colleges Adopt "Good Samaritan" Policies for Drug and Alcohol Emergencies*, PARTNERSHIP FOR DRUG FREE KIDS (Dec. 3, 2013), <http://www.drugfree.org/news-service/colleges-adopt-good-samaritan-policies-for-drug-and-alcohol-emergencies/> [<https://perma.cc/GT6E-QT3H>] (explaining that many colleges and universities have adopted policies to protect students from campus punishment who call emergency services during drug and alcohol emergencies).

⁶⁰ P'ship News Serv. Staff, *supra* note 59. In this article the authors quoted the student body president at the University of Miami who said that there were thirty reports of overdoses or alcohol abuse during the semester the article had come out. *Id.* The student went on to say, "[t]he fear of retribution is what we need to alleviate." *Id.* The same is true of sexual assault. The fear of punishment and retribution from campus enforcement should not be the deciding factor when a survivor chooses not to come forward.

⁶¹ See BYU REPORT, *supra* note 59, at 31; *Sexual and Gender-Based Harassment Policies and Procedures for the Faculty of Arts and Sciences*, HARV. U. 6-7 (Jan. 13, 2016), http://www.fas.harvard.edu/files/fas/files/fas_sexual_and_gender-based_harassment_Policy_and_procedures-1-13-16.pdf [<https://perma.cc/SY3Y-VN63>]. Harvard's policy vows to encourage reporting and acknowledges that students may fear coming forward due to potential punishment from other rules. *Id.* Thus, its new policy promises that "other policy violations will be considered, if necessary, separately from allegations under this [p]olicy." *Id.* at 7. This is not exactly an amnesty clause, and its language is vague to the point that it would be hard to imagine a student would depend on it enough not to fear punishment if he or she

Part analyzes one such university's attempt to remove this barrier to reporting sexual assault. Additionally, at least Maryland, California, New York, and Wisconsin have all attempted to enact statutes attempting to remove this fear of reporting sexual assault.⁶² These statutes, while steps in the right direction, all suffer from similar pitfalls, which will limit their effectiveness. This Part looks at the Maryland statute to demonstrate why these laws fall short.

A. *Good Samaritan-ish Policies at Universities Are Not New*

In other areas of discipline, campuses have already enacted good Samaritan-ish policies to alleviate the fear students may have of getting into trouble, which can prevent them from coming forward.⁶³ For example, over 240 schools have adopted good Samaritan policies to protect students from punishment for underage drinking or from other forms of misconduct when they aid another student during an emergency.⁶⁴ These policies have mixed reviews,⁶⁵ but the reasons for why they are unpopular can be fixed, and their purposes can be applied to the sexual assault setting.

One prominent reason some of these policies are not completely popular is that they sometimes do not afford protection to students with prior campus infractions or people who have already been exempt as good Samaritans once.⁶⁶ The thinking behind such an exception, at least for some, is backed by "the hope . . . that students can learn from [these situations] and won't find themselves in an emergency situation multiple times."⁶⁷ However, asking college students to stay away from situations where an emergency may occur is

comes forward to report an assault. These types of pitfalls and inadequacies render many such policies ineffective. These issues are addressed in this Note.

⁶² See CAL. EDUC. CODE § 67386; MD. CODE ANN., EDUC. § 11-601; N.Y. EDUC. LAW § 6442.1; WIS. STAT. § 125.07(5) (applying only to students involved in alcohol-related offenses, and, thus, someone like Madi who took drugs would be left without any amnesty for coming forward). Much like the Harvard policy criticized above, these statutes have vague language that would make it difficult for a student to understand whether or not they would receive protection from punishment if they were to come forward and report an assault. For example, the California statute requires a student to determine whether their "violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk . . ." CAL. EDUC. CODE § 67386(b)(10). Whether or not something is egregious or puts someone in danger is completely subjective and different people could have different answers as to what violations would preclude someone from protection. In order for these policies to be effective, they "shouldn't be too vague where students could see them as being open for interpretation." Avery Powell, *For College Students, Being a 'Good Samaritan' Can Be Complicated*, USA TODAY (Feb. 6, 2015), <http://college.usatoday.com/2015/02/06/for-college-students-being-a-good-samaritan-can-be-complicated/> [<https://perma.cc/Y76D-E6AT>].

⁶³ See Powell, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

unrealistic, especially when emergencies, by definition, are unforeseeable.⁶⁸ Emergencies can happen at any time.⁶⁹ For example, if two students are drinking in their dorm room while playing video games, one can slip and hit his head on the way to the bathroom because his floor was wet, creating an emergency situation. Drinking and playing video games is not inherently risky behavior, and not the sort that students need to learn from. Asking students to avoid situations where an emergency can take place and where alcohol is consumed would basically ask students to avoid alcohol altogether and, therefore, completely change the way college students have socialized for generations.⁷⁰ That would likely require a cultural change that would take years, if not decades, to take place.⁷¹ Plus, emergencies may happen no matter how safely students are drinking.⁷²

Such an exception has the potential to punish the wrong person. Using the hypothetical in the previous paragraph, is it fair to the student unconscious and bleeding on the ground that his friend has to debate calling emergency services because he has a prior infraction and may get into trouble by the university after he calls an ambulance to help his friend? That dilemma, created by an exception to good Samaritan policies, only punishes the student on the ground who needs help. Whether a person has a previous infraction, or not, has no bearing on

⁶⁸ *Carter v. Reese*, 70 N.E.3d 478, 487 (Ohio 2016) (“An ‘emergency’ is an ‘unforeseen combination of circumstances or the resulting state that calls for immediate action.’”).

⁶⁹ *See id.*

⁷⁰ *See* Richard A. Grucza et al., *Binge Drinking Among Youths and Young Adults in the United States: 1979–2006*, 48 J. AM. CHILD & ACAD. ADOLESCENT PSYCHIATRY 692 (2009) (analyzing drinking trends amongst kids and young adults over the past three decades). There has been no increase in drinking amongst eighteen- to twenty-year-old students, and overall, drinking amongst male college students of all ages has not changed at all. *Id.* at 700. The only group to see an increase in drinking since the 1970s is female college students aged twenty-one to twenty-three. *Id.* Thus, college drinking is not new, and to ask students to avoid places where drinking might be dangerous would be to change the way college students have socialized for decades.

⁷¹ Elizabeth Ann Broughton & William R. Molasso, *College Drinking: Content Analysis of 30 Years of Research*, 47 J.C. STUDENT DEV. 609, 609 (2006) (“Since that time, [1974,] substantial resources have been invested in preventing college alcohol abuse. Yet today, excessive college drinking continues to be a ‘widely acknowledged problem.’” (quoting Vivian B. Faden & Marcy L. Baskin, *An Evaluation of College Online Alcohol-Policy Information*, 51 J. AM. C. HEALTH 101, 101 (2002))); Anna Miller, *New Insights on College Drinking*, 44 MONITOR ON PSYCHOL., Oct. 2013, at 46, 51 (explaining that many of the current recommendations to fixing the college drinking culture are short-term fixes and changing the culture “will take more time”).

⁷² *See, e.g.,* Dan Alexander, *Police: Partying NJ College Student Might Have Survived Had 911 Been Called Sooner*, N.J. 101.5 (Feb. 9, 2017), <http://nj1015.com/police-partying-nj-college-student-might-have-survived-had-911-been-called-sooner/> [<https://perma.cc/2NHZ-PX58>]. In that situation, a young man at a party suffered multiple traumatic injuries from falling down some stairs. *Id.* There was no indication that he was doing anything inherently dangerous, other than drinking and walking down stairs. *Id.* However, after the accident happened, his friends waited twelve hours to call emergency services. *Id.* Perhaps they feared punishment.

whether an emergency is happening. Emergencies do not go away because a student has a previous campus infraction on his record.

Another potential shortcoming of these policies is that for some of the policies, good Samaritan protection only extends to the caller and not the injured student.⁷³ This potentially puts students, whose friends are hurt, to face a difficult decision. If they are protected, but their injured friend is not, they may get their friend in trouble by calling emergency services.⁷⁴ Again, the purpose of these good Samaritan policies is to increase the medical attention students receive. However, if students fear that by calling for help their friend may get in trouble, they may choose not to call for help.

Quality amnesty provisions should be formulated to avoid the shortcomings of these alcohol-related good Samaritan policies. Amnesty policies should be written so that prior infractions do not exclude students from amnesty, and amnesty should extend not only to witnesses but also survivors of sexual assault. If amnesty policies are written to address the shortcomings of the alcohol-related good Samaritan policies, more people would receive amnesty, which means more people would be likely to come forward to report assault, and more perpetrators would be held accountable as a result.

B. “School Initiative” BYU Approach

Shortly after the stories surfaced of BYU punishing students for coming forward and reporting sexual assaults, the university faced federal investigation.⁷⁵ BYU was not alone, however, in facing federal investigation regarding sexual assault allegations.⁷⁶ By October of 2017, 257 postsecondary institutions were under federal investigation.⁷⁷ From these investigations, it was clear the federal government was taking sexual assault on college campuses more seriously by attempting to hold institutions accountable for their

⁷³ Powell, *supra* note 62.

⁷⁴ *Id.*

⁷⁵ Tad Walch, *BYU Under Investigation by Department of Education for Handling of Sexual Assault Reports*, DESERET NEWS (Aug. 8, 2016), <http://www.deseretnews.com/article/865659718/BYU-under-investigation-by-Department-of-Education-for-handling-of-sexual-assault-reports.html?pg=all> [<https://perma.cc/X9BP-U6FP>].

⁷⁶ *Id.*

⁷⁷ *Id.* This substantial and growing list of universities includes prominent universities such as Massachusetts Institute of Technology, Duke University, Columbia University, Cornell University, The Ohio State University, Brown University, Vanderbilt University, Stanford University, University of California-Berkeley, and University of California-Los Angeles. Office of Civil Rights, *List of Sexual Violence Investigations Open at the Postsecondary Level Including the Dates Specific Investigations Were Initiated*, DEP’T EDUC. (Oct. 25, 2017), https://www.insidehighered.com/sites/default/server_files/files/2017_10_25%20PSE%20SV%20investigation%20list%20-%20355%20investigations%20at%20257%20institutions.pdf [<https://perma.cc/R5DP-5SBN>].

shortcomings. After community backlash⁷⁸ and the federal investigation began, BYU sought to revamp its policies.⁷⁹ In October of 2016, the university revealed its new policy recommendations.⁸⁰ Prior to the release of these recommendations, many throughout the BYU community and various advocacy groups were lobbying for an immunity clause to protect survivors from receiving university punishment after coming forward.⁸¹ Apparently, BYU administration heard their protests, as the proposed sexual assault policy had a detailed amnesty policy to protect the survivors that come forward.⁸² The report stated that “neither a reporting victim nor a witness in an incident of sexual misconduct will be subjected to university discipline for an Honor Code violation occurring at or near the time of the reported sexual misconduct unless the health or safety of others is at risk.”⁸³ This is a very positive step in the right direction as this policy serves not only to protect the survivors of assaults, but also those who report the incidents, whether it be a friend, bystander, or passerby.

Additionally, in order to encourage the reporting of sexual misconduct, the university will also offer “leniency” for other honor code violations that are not directly related to the sexual assault but may be discovered during the sexual assault investigation.⁸⁴ The university also proposed that later-discovered violations will be handled in a way that would allow the student to remain in school while these violations are addressed.⁸⁵ This is an important inclusion because unfavorable conduct of the victim may come out during sexual assault investigations.⁸⁶ For example, at BYU, a student would be found in violation of

⁷⁸ See Stuckey & Piper, *supra* note 5 (recounting how protestors demanded an amnesty clause after the stories of Madi and others at BYU became public).

⁷⁹ Emily Hellewell, *National Expert Meets with BYU Leaders on Sexual Assault*, BYU NEWS (Aug. 18, 2016), <https://news.byu.edu/news/national-leader-sexual-assault> [<https://perma.cc/7PLQ-SRZS>].

⁸⁰ BYU REPORT, *supra* note 59, at 31.

⁸¹ See Walch, *supra* note 75 (noting more than 115,000 people have signed an online petition calling on the university to provide an immunity clause in the honor code for survivors of sexual assault). The online petition was started by Madi Barney, one of the students BYU suspended after she came forward to report the sexual assault against her. *Id.*

⁸² See BYU REPORT, *supra* note 59, at 30–31.

⁸³ *Id.* at 31.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See, e.g., Jessica Valenti, *No College Should Ever Ask for the Sexual History of Alleged Rape Victims*, GUARDIAN (Aug. 12, 2015), <https://www.theguardian.com/commentisfree/2015/aug/12/no-college-should-ask-sexual-history-students-wesleyan> [<https://perma.cc/C6MW-JWFU>] (accounting the story of student whose sexual history became the forefront of a campus sexual assault investigation). At BYU, if it came out during an investigation that a student had previous sexual history before marriage, that student would be found to be in violation of the school’s honor code. See Tyler Kingkade, *BYU Students Can’t Have Premarital Sex, but This Woman Wants To See That Change*, HUFFPOST (Aug. 14, 2014), http://www.huffingtonpost.com/2014/08/14/byu-students-sex-cosmo_n_5678969.html [<https://perma.cc/HDL4-TJAB>] (“BYU has an honor code all students must abide by that

the honor code if the university learns that the student had a sexual experience before marriage during their time at BYU. If there is no immunity clause and survivors are afraid of punishment for unrelated conduct that violates the honor code, this could and likely has deterred many from coming forward. The report's proposed immunity would reduce this deterrence.

Another important recommendation to BYU's sexual assault policy was to have completely separate spaces and operations for its Honor Code Office and for its Title IX Office.⁸⁷ Previously, the Title IX Office and the Honor Code Office, which is the BYU prosecutorial entity that enforces the school's rigid honor code, had overlapping personnel and work spaces.⁸⁸ As a result, information was shared between the offices and "employees may have brought perspectives, biases, attitudes, methodologies, and assumptions from their [honor code] assignments to their new Title IX duties."⁸⁹ The university validated input given by students and admitted that this commingling between the offices might have resulted in a "lack of sensitivity" when students came to the Title IX Office.⁹⁰ Students reported being treated like they were the ones at fault when they went to the Title IX Office where they spoke to current and former honor code officials.⁹¹ Additionally, these students could not be sure their Title IX report would not end up in the Honor Code Office and be used to punish them.⁹² It is not difficult to see how such a setup would deter a young student who wishes to come forward to report an assault. Setting up completely different offices, with different physical spaces and different staff, and not allowing information to be shared between the offices, would help to alleviate such concerns survivors may have.

The only exception to the new policy is that when an accused assailant is potentially in violation of the honor code, the Title IX Office may pass information to the Honor Code Office, but this may take place only once a Title

includes not engaging in premarital sex."). Thus, before BYU's policy changes, if the school found out during an assault investigation that a person had a previous sexual history, that student could face punishment. The new policy helps to alleviate such a situation.

⁸⁷ BYU REPORT, *supra* note 59, at 2.

⁸⁸ *Id.* at 2, 13.

⁸⁹ *Id.* at 13.

⁹⁰ *Id.*

⁹¹ Cabrera & Weisfeldt, *supra* note 1; see also *Honor Code Investigation and Administrative Review Process*, BYU 1–2 (Aug. 11, 2008), <https://policy.byu.edu/view/index.php?p=171> [<https://perma.cc/K6E9-RMTP>] (providing a detailed account of the Honor Code Office's prosecutorial powers at BYU). The plain language of the honor code policy states "[t]he university, at its discretion, may choose to investigate reported or suspected Honor Code violations." *Id.* Thus, rather than being mandated, the school chose to investigate and punish Madi and Brooke. A well-formulated amnesty policy would remove this sort of discretion. Cabrera & Weisfeldt, *supra* note 1.

⁹² See, e.g., Healy, *supra* note 1. This was exactly what happened at BYU to Brooke. After reporting her sexual assault to the Title IX Office, the Honor Code Office suspended her from school. *Id.* This suspension could only be a direct result from the Title IX Office passing along her initial report to the Honor Code Office.

IX investigation is complete.⁹³ No potential honor code allegations against the complainant may be passed to the Honor Code Office, even when an investigation is complete, and information regarding the complainant can only pass from office to office with the consent of the complainant.⁹⁴

These changes have shown positive results shortly after their implementation.⁹⁵ One senior said that the “huge culture of fear” had eased, which is demonstrated by the increased reporting on campus.⁹⁶ In fall of 2017, the new full-time Title IX administrator reported that the university had received more reports in the first few weeks of the new semester than it had throughout the entire fall 2016 semester.⁹⁷ These early results demonstrate that amnesty clauses are effective in helping remove the fear barrier to reporting sexual assault. These results also show that if the Betsy DeVos Department of Education does not enact such policies, or Congress refuses to add such policies to Title IX, then universities can make huge differences on their own campuses.⁹⁸

C. Maryland Approach: MD. CODE ANN., EDUC. § 11-601

In Maryland, the state legislature has taken it upon itself to fix the way campuses react to survivors of sexual assault and has passed legislation to disallow colleges and universities from punishing survivors of sexual assault that make the difficult decision to come forward.⁹⁹ Author of the bill, Shelly Hettelman, said the bill is intended to put survivors at the center of decision-making.¹⁰⁰ It also seeks to remove at least one of the barriers survivors face

⁹³ BYU REPORT, *supra* note 59, at 23.

⁹⁴ *Id.* at 24.

⁹⁵ See Taylor Stevens, *Brigham Young University Students Say Sexual Assault Policy Changes Have Eased ‘Culture of Fear,’ but There’s More Work To Be Done*, SALT LAKE TRIB. (Oct. 22, 2017), <http://www.sltrib.com/news/education/2017/10/22/brigham-young-university-students-say-sexual-assault-policy-changes-have-eased-culture-of-fear-but-theres-more-work-to-be-done/> [<https://perma.cc/36BP-W4FB>].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *infra* Part IV.C (discussing how universities should act on their own if Congress and the U.S. Department of Education refuse to enact amnesty clauses).

⁹⁹ Tara Richards & Jane Palmer, Opinion, *New Assault Reporting Law Should Improve Prevention*, BALT. SUN (June 29, 2015), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-assault-reporting-20150628-story.html> (on file with *Ohio State Law Journal*) (“On some campuses, students risk getting in trouble for violating their school’s conduct code if they disclose the use of alcohol or drugs, even in the context of an assault. To help reduce this barrier to seeking help, another provision of the new law will, under most circumstances, provide amnesty for alcohol-or drug-related conduct violations for victims or witnesses who in good faith report a sexual assault that involves alcohol or drugs.”).

¹⁰⁰ See Marc Shapiro, *Hettelman’s Sexual Assault Bill Moving Forward*, BALT. JEWISH TIMES (Mar. 19, 2015), <http://jewishtimes.com/35471/hettlemans-sexual-assault-bill-moving-forward/news/local-news/> [<https://perma.cc/GQ2R-U7KQ>].

when reporting sexual assault.¹⁰¹ The pertinent part of the Maryland statute, now enacted into law, reads as follows:

Prohibiting the imposition of a campus conduct action, except for a mandatory intervention for substance abuse, for a violation of the alcohol or drug use policies of the institution of higher education for a student who reports to the institution or a law enforcement officer an incidence of sexual assault or who participates in an investigation of a sexual assault as a witness if:

- i. The institution of higher education determines the violation occurred during or near the time of the alleged sexual assault;
- ii. The student is determined to have made the report of sexual assault or is participating in an investigation as a witness in good faith; and
- iii. The institution of higher education determines that the violation was not an act that was reasonably likely to place the health or safety of another individual at risk¹⁰²

Not only does the law protect students from university discipline, but the statute also requires colleges and universities to partner with local law enforcement agencies and community programs to improve responses to sexual assault allegations.¹⁰³ Professors and other advocates in Maryland believe that this new law will have an important impact and improve prevention and reporting of sexual assault.¹⁰⁴ However, these supporters also note it will take time to see if the new law, which they claim to be the “first of its kind,” will have an important impact.¹⁰⁵

This statute takes many positive steps to help alleviate the fear of punishment many survivors and witnesses of sexual assault face when deciding whether to come forward. However, there is potential that the new law will not remove the fear of punishment barrier as much as it intends. Two of the three qualifiers under section 7 require the potential reporter, whether the survivor or

¹⁰¹ See, e.g., Richards & Palmer, *supra* note 99 (“One barrier to reporting for college students is the role of alcohol or substance abuse in sexual assault.”).

¹⁰² MD. CODE ANN., EDUC. § 11-601(7) (LexisNexis Supp. 2017).

¹⁰³ *Id.* § 11-601(9) (“Pursuing formalized agreements with: (i) The local law enforcement agency that complies with the relevant provisions of Title IX of the Education Amendments of 1972 and clearly states when a school will refer a matter to local law enforcement; and (ii) A State designated rape crisis program, federally recognized sexual assault coalition, or both that formalizes a commitment to provide trauma-informed services to victims of sexual assault and improve the overall response to sexual assault by the institution of higher education.”); see, e.g., Richards & Palmer, *supra* note 99 (arguing that the new law will shed light on the nature and extent of sexual assault in Maryland schools and lead to more effective responses).

¹⁰⁴ See, e.g., Richards & Palmer, *supra* note 99.

¹⁰⁵ *Id.*

the witness, to make judgment calls surrounding their eligibility for immunity. These qualifiers force the potential survivor or witness to ask him or herself: *Did my violation occur close enough in time to the sexual assault? Did my violation put anyone else in danger?*¹⁰⁶ Both of these questions are judgment calls and two people may reach different conclusions in similar situations. Supporters of good Samaritan-ish policies have said that for these policies to have any measurable effect, they “shouldn’t be too vague where students could see them as being open for interpretation.”¹⁰⁷ The qualifiers listed in the statute are completely open for interpretation, and someone who fears being punished may not choose to come forward if they have any doubt they qualify for the statute’s protection.

IV. AMEND TITLE IX

“At issue is not the Title IX statute itself, which simply outlaws discrimination in educational institutions on the basis of gender. The problem is the way in which Title IX has been applied.”¹⁰⁸

“Title IX is the federal law that governs discrimination on the basis of sex at federally funded educational institutions.”¹⁰⁹ Many are aware that it applies to sports; however, it also contains provisions for campuses for dealing with sexual harassment and assault.¹¹⁰ Title IX, although not well understood, has come into the spotlight in recent years as the issue of campus sexual assault has come to the forefront, gaining attention from scholars and even the White House.¹¹¹ In January of 2014, the White House Task Force to Protect Students

¹⁰⁶ See MD. CODE ANN., EDUC. § 11-601(7)(i), (iii).

¹⁰⁷ Powell, *supra* note 62.

¹⁰⁸ ALLISON KASIC & KIMBERLY SCHULD, INDEP. WOMEN’S F., TITLE IX AND ATHLETICS: A PRIMER 1 (Sept. 2008), <http://www.iwf.org/files/6eb8c73b785c0d0b1be6b0abc7778379.pdf> [<https://perma.cc/F9AP-6XKC>]. The problem is not with the goals and ideals of the Title IX statute. The problem is how institutions have applied Title IX.

¹⁰⁹ Keri Smith, Comment, *Title IX and Sexual Violence on College Campuses: The Need for Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 ST. LOUIS U. PUB. L. REV. 157, 158 (2015).

¹¹⁰ *Id.*

¹¹¹ For some of the recent literature on Title IX and sexual assault, see Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563 (2014) (providing an overview of the problem of campus sexual violence, current laws and obligations that require colleges to address it, and recommendations for policies that effectively address the epidemic of campus sexual violence); Sarah Edwards, *The Case in Favor of OCR’s Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL’Y 121 (2015) (discussing how colleges are attempting to comply with Title IX, the backlash against stricter policies, and why stricter guidelines are appropriate); Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132 (2016) (discussing the time lags and other challenges sexual assault survivors face in reporting to the Office of Civil Rights and arguing that the agency needs to establish consistent guidelines for

Against Sexual Assault released a twenty-page report called “Not Alone” which included statements from President Obama and suggestions to college campuses as to how to handle the epidemic of sexual assault.¹¹²

Even with this increased awareness, little information has been provided as to how individual institutions of higher education actually handle sexual assault allegations.¹¹³ The information is university specific, and thus scattered and inconsistent.¹¹⁴ This follows a common line of criticism that Title IX, as interpreted and enforced by the Office of Civil Rights (OCR), only provides vague guidelines for deciding whether an institution’s grievance procedures are acceptable.¹¹⁵ Thus, when there are over 7,000 postsecondary institutions under Title IX’s purview¹¹⁶ that are governed under such vague guidelines, it is no wonder the sexual assault protocols of different higher education entities are scattered, different, and ineffective. It is easy to understand how a school like BYU could get away with having only a part-time Title IX coordinator for so long.¹¹⁷ To solve this problem, Title IX needs to have concrete and uniform rules for these entities to handle sexual assault violations.¹¹⁸ With the goal in mind to remove barriers that prevent survivors from choosing to report, this Part proposes key amendments to Title IX that would be mandatory for *all* schools to follow. Many more changes to Title IX will need to be made to create a uniform sexual assault protocol, but this Note only focuses on the goal of removing barriers to reporting.

communicating with survivors); *see also* Press Release, U.S. Dep’t. of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<https://perma.cc/W886-7EF8>].

¹¹² WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT, at ii (Apr. 2014), <https://www.justice.gov/ovw/page/file/905942/download> [<https://perma.cc/ZK8Q-QMRD>].

¹¹³ Heather M. Karjane et al., EDUC. DEV. CTR., CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND, at vi (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf> [<https://perma.cc/84HP-FYFW>] (“Despite the emergence of concern about sexual victimization among postsecondary students, little systematic information has been published about the content of sexual assault policies, protocols, and programs that currently exist in [institutions of higher education].”).

¹¹⁴ Smith, *supra* note 109, at 158–59.

¹¹⁵ Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 99 (2010).

¹¹⁶ Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP’T EDUC. (Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/B49N-L3X8>].

¹¹⁷ *See* BYU REPORT, *supra* note 59, at 20.

¹¹⁸ *See generally* Smith, *supra* note 109, at 169, 177–78 (discussing the many ways that the handling of sexual assault allegations would improve under a uniform system and pointing out the pitfalls of the current, scattered system).

A. Amnesty from Drug and Alcohol Rules

The first change to Title IX should include an amnesty clause to provide amnesty both to survivors and witnesses of sexual assault from university drug and alcohol rules if they report a sexual assault or cooperate with a sexual assault investigation. As mentioned, fear of getting into trouble is a real concern survivors and witnesses face when deciding whether to report a sexual assault.¹¹⁹ Deciding to report sexual assault is difficult enough for any survivor, and the fear of getting into trouble should not be one of the difficult factors a student wrestles with when deciding whether to take steps to hold their perpetrator accountable. Amnesty clauses remove the “getting into trouble” factor from survivors’ decision-making processes, and would likely remove this barrier to reporting assault.¹²⁰ In fact, authors of amnesty bills have stated the purpose of their bills is to increase reporting.¹²¹ The following recommendations come from the language of current state statutes¹²² and the

¹¹⁹ DEAR COLLEAGUE LETTER, *supra* note 15, at 15.

¹²⁰ Removing this barrier to reporting sexual assault and increasing reporting is the stated purpose of BYU’s new policy. BYU REPORT, *supra* note 59, at 31 (“To encourage the reporting of sexual misconduct, the university will also offer leniency for other Honor Code violations . . .”).

¹²¹ See Nico Savidge, *Bill Giving Sexual Assault Victims Amnesty from Drinking Tickets Passes Committee*, WIS. ST. J. (Jan. 28, 2016), http://host.madison.com/wsj/news/local/education/university/bill-giving-sexual-assault-victims-amnesty-from-drinking-tickets-passes/article_4eeb2595-5307-5b4e-8cae-1abf4a690659.html [<https://perma.cc/MH25-ZS8H>] (“Ballweg said the goal of her bill is to increase reporting of sexual assault by removing one concern in the minds of underage victims -- that they could be ticketed or face university sanctions if they were drinking before they were assaulted.”).

¹²² To see the language from the Maryland statute, see MD. CODE ANN., EDUC. § 11-601 (LexisNexis Supp. 2017). The California language is as follows:

Providing that an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the institution’s student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty.

CAL. EDUC. CODE § 67386(b)(10) (West Supp. 2018). The language from the New York statute is as follows:

A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to [Institution’s] officials or law enforcement will not be subject to [Institution’s] code of conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault.

BYU Policy,¹²³ but includes minor tweaks to improve effectiveness. The goals of the recommendations are to increase specificity and decrease vagueness so that students will know if they will receive protection from punishment for coming forward. The language should begin as follows:

Neither a survivor nor a witness of an incident of sexual misconduct will be subjected to university discipline for an honor code violation occurring at or near the time of the reported sexual misconduct unless the violation injured another person.

This policy deviates from the current approaches by removing the caveat that “unless [the violation put] the health or safety of others . . . at risk”¹²⁴ a survivor or witness receives immunity. Instead, the caveat in the proposal focuses on actual harm produced by the violation by shielding reporting students “unless the violation injured another person.” This difference is beneficial for two reasons.

First, when dealing with sexual assault, one is dealing with actual harm. The focus should be finding out who committed the actual harm and holding that person accountable. As discussed above, a barrier to the process can be the fear of getting into trouble. If students are afraid that the violation they committed might have put others’ safety at risk, then they may not come forward. A risk caveat forces survivors and potential witnesses to make a judgment call as to how dangerous their rule violation was. This is a subjective endeavor as humans have differing views as to what may put others at risk. By forcing students to determine if their violation put others at risk, one is risking not dealing with *actual* harm stemming from a sexual assault because students are worried about the harm that their drug or alcohol violations had the *potential* to cause, rather than what their violations *did* cause. By including the language “unless the violation injured another person” in the proposed amendment, whether or not amnesty applies to a student is much more objective.

Second, the change from “unless the [violation put the] health or safety others . . . at risk”¹²⁵ to “unless the violation injured another person” is important

N.Y. EDUC. LAW § 6442.1 (McKinney 2016). Out of these statutes, New York’s is the closest to the mark. It does need a tweak to get rid of the ambiguity in the “at or near” language. The Wisconsin statute provides the broadest protection for those who qualify for the statute; however, the statute only applies to those who were drinking alcohol. *See* WIS. STAT. § 125.07(5) (West Supp. 2017). Thus, someone like Brooke, who took a drug other than alcohol, would not qualify for amnesty.

¹²³ For the draft language of the new BYU policy, see BYU REPORT, *supra* note 59, at 30–31.

¹²⁴ *See, e.g., id.* at 31.

¹²⁵ *E.g.,* CAL. EDUC. CODE § 67386(b)(10); MD. CODE ANN., EDUC. § 11-601(7)(iii); BYU REPORT, *supra* note 59, at 30–31. The California policy also has the same pitfall: “[u]nless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk.” CAL. EDUC. CODE § 67386(b)(1).

because many students would not qualify for amnesty under existing policies, making those policies too narrow. The college drinking and drug-using cultures often involve situations that put “the health or safety of others at risk” in some form or another.¹²⁶ If the goal is to actually remove a barrier to reporting of assault, then the policy should be much less narrow so as not to eliminate so many students from receiving amnesty. By excluding only the students that actually “injured another person,” amnesty would include a lot more students, which would hopefully remove a substantial barrier to reporting sexual assault and lead to more perpetrators being held accountable.

The second part of an effective amnesty policy would be language to protect students whose previous violations may be discovered during a Title IX investigation. If a student fears that previous violations may be discovered if they become involved in an investigation, they have the same fear as a student who was committing a drug or alcohol violation at or near the moment of an assault. To alleviate this fear, the language should be as follows:

To increase reporting of sexual misconduct, every university will also offer immunity for violations that are not directly related to the incident but that are discovered in the investigatory process, unless the violations injured another person.

This is a slight variation from the new BYU standard and is very different from the current state standards. Under BYU’s new policy, the school will only offer the vague reward of “leniency” for violations that are not directly related to the incident, which may be discovered as a result of the investigatory process,¹²⁷ while current state statutes do not have any such clauses and only extend immunity to violations “at or near” the time of the incident.¹²⁸

Compared to immunity, “leniency” is too vague for an amnesty policy to work. Again, the goal is to remove barriers students face to reporting. If a student even fears that a violation may be discovered, even if it is unrelated to the sexual assault at issue, then the student may be afraid to come forward. BYU’s approach is a step in the right direction, but the vague term “leniency” is not concrete enough to incentivize students to come forward and report or

¹²⁶ See Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 453 (2007).

¹²⁷ BYU REPORT, *supra* note 59, at 31 (“To encourage the reporting of sexual misconduct, the university will also offer *leniency* for other Honor Code violations that are not directly related to the incident but which may be discovered as a result of the investigatory process.” (emphasis added)).

¹²⁸ This shortcoming is problematic for students who fear that their past violations may come to light if they initiate a sexual assault investigation. This situation is easy to imagine. For example, a female sexual assault survivor wants to report her male perpetrator, but he knows that she has hosted several parties with alcohol and drugs in her dorm room. Because these violations did not occur “at or near” the time of the assault, she could still be punished for them.

cooperate with an investigation.¹²⁹ Leniency could mean a one-semester suspension instead of two; it could mean probation rather than dismissal.¹³⁰ It is simply too vague to adequately remove any barriers to reporting.

Also, whether a violation happened "at or near" the time of a sexual assault or happened months earlier, the fear of the violation being discovered is exactly the same, and thus, the barrier to report is exactly the same. To a person afraid to come forward out of fear of getting into trouble, it makes no difference when the violation happened if that violation might get them into trouble. Therefore, even the students whose violations that are not directly related to the sexual misconduct being investigated are discovered during an investigation should also receive immunity if they come forward and report a sexual assault or participate in an investigation.

The third piece that an effective amnesty policy should include is a provision that does not preclude students from receiving amnesty if they have prior university discipline or have received amnesty before. The language should be as follows:

Prior university discipline or receiving amnesty in the past does not preclude students from receiving amnesty from future violations.

One of the biggest criticisms of the good Samaritan policies mentioned earlier was that students that had previous campus violations and discipline did not qualify for immunity again.¹³¹ One reason for such policies is that schools do not want repeat drug and alcohol offenders to get off the hook for breaking the same rules they did before.¹³² Schools may worry that students with alcohol and drug violations would not correct their behavior if they could receive immunity from being punished for that behavior. That point of view may have some merit; however, the proposed immunity would only result from violations discovered during the sexual assault investigation and would not grant blanket immunity forever from university drug and alcohol sanctions.

Again, these good Samaritan policies would reduce reporting if they make a student refuse to come forward because he or she has received discipline for a previous violation and does not want to get in trouble for another violation. Public health studies indicate that around 65% of college students drink in a

¹²⁹ See Powell, *supra* note 62 ("[P]olicies shouldn't be too vague where students could see them as being open for interpretation."). "Leniency" is open for interpretation. See BYU REPORT, *supra* note 59, at 8 (contrasting leniency with "significant consequences—such as suspension or expulsion").

¹³⁰ See *Honor Code Investigation and Administrative Review Process*, *supra* note 91, at 4 (listing possible consequences).

¹³¹ E.g., Powell, *supra* note 62 ("The person in need of help can only be granted amnesty once at George Washington University. The same is true at George Mason University. . . .").

¹³² *Id.* ("GMU's Associate Dean of Students Juliet Blank-Godlove says this limit exists so the first time can be an educational opportunity.").

given month¹³³ and 36.6% of students report having used illegal drugs at some point in the previous year.¹³⁴ Thus, some good Samaritan policies exclude students who have been caught doing something that is fairly common among college students. This is not to say that this behavior is not serious—it very well it can be¹³⁵—but sexual assault is *always* very serious. It is more important that universities hold sexual assault violators accountable and that students feel like they are able to come forward.¹³⁶ Thus, even if students have previous drug and alcohol violations, they too should receive immunity if they come forward and help in a sexual assault investigation.

The three suggestions above, if incorporated into Title IX and applied to every school, should result in fewer barriers to reporting sexual assault or participating in a sexual assault investigation. Ultimately, reporting would increase, which should result in increased accountability for those that commit assaults.¹³⁷ If Congress leaves Title IX “as is” and universities do not adopt these recommendations or similar ones, stories like Madi’s and Brooke’s¹³⁸ may become more and more common.¹³⁹ Also tragic will be those stories never told because survivors are afraid their university will punish them after coming forward.¹⁴⁰ These outcomes are unacceptable and would be prevented if Congress and universities adopt these suggestions.

B. Separate Office Space and Independent Function for Title IX and University Discipline Offices

One of the tragedies of Brooke’s story, mentioned earlier, was how freely information regarding her personal tragedy was passed from the university’s Title IX Office to the school’s Honor Code Office.¹⁴¹ Part of the problem of this

¹³³ Aaron White & Ralph Hingson, *The Burden of Alcohol Use: Excessive Alcohol Consumption and Related Consequences Among College Students*, 35 ALCOHOL RES. 201, 202 (2014).

¹³⁴ Kevin E. O’Grady et al., *Heavy Drinking and Polydrug Use Among College Students*, 38 J. DRUG ISSUES 445, 447 (2008).

¹³⁵ Peters, *supra* note 126, at 453.

¹³⁶ See BYU REPORT, *supra* note 59, at 22–23 (listing assistance and safety as reasons to increase reporting).

¹³⁷ *Id.* at 23–24 (citing the problem of serial perpetrators).

¹³⁸ See generally Healy, *supra* note 1 (describing Brooke’s and Madi’s stories).

¹³⁹ This is alluded to in the Dear Colleague Letter. See DEAR COLLEAGUE LETTER, *supra* note 15, at 15. See generally Healy, *supra* note 1 (describing Brooke’s and Madi’s stories).

¹⁴⁰ See DEAR COLLEAGUE LETTER, *supra* note 15, at 15 (“Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved. As a result, schools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.” (footnote omitted)).

¹⁴¹ See BYU REPORT, *supra* note 59, at 13. Brooke reported the assault against her to BYU’s Title IX Office and never initiated any contact with the Honor Code Office, yet it was the Honor Code Office that made the determination that she had violated the Honor Code. See Erin Alberty et al., *BYU Students Say Victims of Sexual Assault Are Targeted by*

system was that the school's part-time Title IX coordinator reported to the same person those in the Honor Code office did.¹⁴² It is easy to see how the office that oversees sexual assault protocol would also associate with the office that hands out campus discipline. In some ways, they share the same goals, including making sure violators of campus policies are held accountable.¹⁴³ However, the problem is that the school discipline office hands out campus discipline to *all* students, including survivors of sexual assault, which is how people like Brooke get punished when they come forward to report sexual assault.¹⁴⁴ Thus, when Brooke came to report the sexual assault, as somebody who had committed a campus violation, she was reporting to the same physical place that also prosecuted her for the violations she committed.¹⁴⁵ This would be intimidating for many student survivors who have violated campus policies and may deter them from reporting sexual assault.¹⁴⁶

To alleviate this concern, the Title IX office and the campus discipline office should be separate structurally and procedurally.¹⁴⁷ The only way information should be passed between the two offices is with the consent of the survivor of

Honor Code, SALT LAKE TRIB. (Oct. 17, 2017), <http://www.sltrib.com/news/2017/07/27/byu-students-say-victims-of-sexual-assault-are-targeted-by-honor-code/> [<https://perma.cc/L6NR-E7GQ>] ("Over the summer, a dean initiated a video conference with the Honor Code Office."). Because she did not initiate any contact with the Honor Code Office, the only way her report could have gone from the Title IX Office to the Honor Code Office is if the information was passed without her permission. See *BYU REPORT*, *supra* note 59, at 13 ("[S]ome communication between the two offices occurred.").

¹⁴² See *BYU REPORT*, *supra* note 59, at 13.

¹⁴³ See *Information for Victims*, BYU, <https://titleix.byu.edu/sites/default/files/Title%20IX%20Information%20for%20Victims%20Handout.pdf> [<https://perma.cc/T45M-5J3L>] (Title IX Office); *What To Expect*, BYU, <https://honorcode.byu.edu/what-to-expect> [<https://perma.cc/2HE N-GGUB>] (Honor Code Office).

¹⁴⁴ See *Honor Code Investigation and Administrative Review Process*, *supra* note 91, at 1 ("The university, at its discretion, may choose to investigate reported or suspected Honor Code violations."). There is nothing in these policies that indicates the Honor Code Office may treat survivors of assault differently than other students who have violated certain rules. Thus, if someone were to come forward to the Title IX Office, which shared personnel and function with the Honor Code Office, reporting an assault may feel like a guilty plea. *BYU REPORT*, *supra* note 59, at 13 ("[A] student . . . could assume, as some reported, that their Title IX case had been sent directly to the Honor Code Office.").

¹⁴⁵ Brooke reported her assault to the Title IX Office, but that was also the same space that housed the Honor Code Office, and some of the personnel between the offices overlapped. See *BYU REPORT*, *supra* note 59, at 15. To fix this problem, BYU has made plans to make sure there is completely separate function between the offices. *Id.* at 20 ("Every effort should be made to separate the Honor Code Office from the Title IX Office—physically as well as structurally and procedurally.").

¹⁴⁶ See *id.* at 15 ("The proximity of office space and the shared reporting line through the dean of students make it difficult for students and staff to differentiate the activities, purposes, and functions of the two offices."); *id.* at 20 ("We . . . acknowledge the perception of shared information and decision making with the Dean of Students Office between Title IX and Honor Code personnel.").

¹⁴⁷ *Id.* at 13, 20.

a sexual assault. This is for a few reasons: (1) survivors should not be punished for coming forward. As previously discussed, this creates a barrier that prevents students from coming forward.¹⁴⁸ If survivors must report to the same office that has jurisdiction over the survivor, the survivor's likelihood of receiving punishment increases. But also, (2) a major reason survivors do not come forward is because of confidentiality concerns.¹⁴⁹ The Title IX and Honor Code offices at BYU did not show much compassion toward Brooke on this front.¹⁵⁰ Instead, they passed her information from office to office and without any concern for her wishes. If survivors can control who can access their case information, it may lessen their concerns about coming forward and could therefore remove another barrier. Hopefully, this would increase reporting.

The policies mentioned above should ease the burden some survivors and witnesses face when deciding whether to report or participate in a sexual assault investigation around college campuses. Hopefully, this would result in increased reporting and would lead to more perpetrators being held accountable.

C. Proactive Rules for Universities

To remove the fear barrier, which prevents students from reporting sexual assault, the best solution would be for Congress to amend Title IX and force all colleges and universities to follow uniform policies.¹⁵¹ This should decrease the amount of universities following outdated, dangerous, and ineffective policies, which create the problems seen at universities like BYU.¹⁵² With uniform policies, the instructions from the OCR would no longer be vague guidelines;¹⁵³

¹⁴⁸ See DEAR COLLEAGUE LETTER, *supra* note 15, at 15.

¹⁴⁹ Gray, *supra* note 21 (“[R]esearch shows that college victims don’t report sexual assault to the police because they don’t want anyone to know.”); Sable et al., *supra* note 23, at 159.

¹⁵⁰ See Cabrera & Weisfeldt, *supra* note 1. Brooke reported the assault against her to the university’s Title IX Office and did not initiate contact with the Honor Code Office. *Id.*; see also Alberty et al., *supra* note 141. Yet, it was through the Honor Code Office she was suspended, indicating her report was passed from the Title IX Office to the Honor Code Office. See BYU Report, *supra* note 59, at 13 (reporting findings that suggested significant organizational and managerial overlap between the two offices).

¹⁵¹ See generally Smith, *supra* note 109 (talking about the many improvements that would come under a uniform system and pointing out the pitfalls of the current, scattered system).

¹⁵² Because BYU was following outdated policies, BYU had only a part-time Title IX coordinator, who reported to the same office that punished survivors of sexual assault. BYU REPORT, *supra* note 59, at 2, 13; see also Ashley Lee & Ashlyn Allred, *BYU Updates Title IX Policy, Includes Amnesty Clause for Sexual Assault Victims*, DAILY UNIVERSE (Oct. 26, 2016), <http://universe.byu.edu/2016/10/26/byu-updates-title-ix-policy-includes-amnesty-clause-for-sexual-assault-victims/> [<https://perma.cc/CQ6G-U6KV>] (describing subsequent changes to BYU’s policy).

¹⁵³ See Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance> [<https://perma.cc/DRA5-LAEF>] (comparing administrators’ perceptions of how clear

instead, these instructions would be enforceable policies that universities would have to follow.

However, institutions should not wait for Congress to act before adopting these policies on their own. The gridlock and perceived unproductiveness of Congress has been well-documented in recent years.¹⁵⁴ Thus, it may take time for Congress to pass such an important amendment to Title IX.

The slow rate at which Congress may move on this issue could be compounded by the recent confirmation of Betsy DeVos. As Secretary of Education, she will oversee the OCR, which enforces Title IX.¹⁵⁵ However, in DeVos's confirmation hearing, when asked if she would commit to upholding the Obama Administration's guidelines for handling sexual assault on college campuses, which include the policy recommendations found in the Dear Colleague Letter, she demonstrated ambivalence to accepting those guidelines.¹⁵⁶ Specifically, she was asked the following by Senator Bob Casey, Jr.: "In 2011, the Department of Education issued guidance on Title IX by this . . . current Administration. I ask you, would you uphold that 2011 Title IX guidance as it relates to sexual assault on campus?"¹⁵⁷ She responded, "I know that there is a lot of conflicting ideas and opinions around that guidance"¹⁵⁸ When pressed for a simple yes or no answer, she responded, "It would be premature for me to do that today."¹⁵⁹ These statements leave little confidence that she will move fast on this issue or even uphold the Obama Administration's initiatives.¹⁶⁰

the guidelines are); *see also* Walker, *supra* note 115, at 99 ("The Office for Civil Rights at the Department of Education ("OCR") has promulgated vague guidelines identifying 'a number of elements [used] in evaluating whether a school's grievance procedures are prompt and equitable.'" (alteration in original) (quoting OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 20 (2001), <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/K4G4-LF8N>])).

¹⁵⁴ *See, e.g., Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/CAA4-G6NK>] (showing the sharp decline of congressional approval ratings in recent years); Norm Ornstein, *Is This the Worst Congress Ever?*, ATLANTIC (May 17, 2016), <https://www.theatlantic.com/politics/archive/2016/05/is-this-the-worst-congress-ever/483075/> [<https://perma.cc/ZSU4-WF4Z>].

¹⁵⁵ Office for Civil Rights, *About OCR*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>. [<https://perma.cc/7FLC-CQK2>].

¹⁵⁶ *Education Secretary Confirmation Hearing*, at 1:18:29–42 (C-SPAN television broadcast Jan. 17, 2017), <https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-DeVos-testifies-confirmation-hearing>.

¹⁵⁷ *Id.* at 1:17:45–18:02 (question from Senator Bob Casey).

¹⁵⁸ *Id.* at 1:18:03–09.

¹⁵⁹ *Id.* at 1:18:30–41.

¹⁶⁰ Her ambivalence to accepting those guidelines may have to do with her donations to the Foundation for Individual Rights in Education (FIRE). *See* Benjamin Wermund, *DeVos' Donations Spark Questions About Her Stance on Campus Sexual Assault*, POLITICO (Jan. 9, 2017), <https://www.politico.com/story/2017/01/betsy-DeVos-education-sexual-assault-233376> [<https://perma.cc/DM2E-VBHC>]. She has reportedly donated at least \$10,000 to the

DeVos indeed squelched any hope that she would enforce progressive policies, including amnesty clauses, when she announced that the Department of Education would depart from the guidance provided in the Dear Colleague Letter.¹⁶¹ In doing so, she alleged that the Obama-era policies have failed survivors and the wrongly accused.¹⁶² However, she misrepresented the guidance from the Obama era and demanded many of the rights already included in the Dear Colleague Letter, including that the accused receive proper notice of the accusation and access to evidence against them, and that proper appellate procedures be in place.¹⁶³

In departing from the Dear Colleague guidance, the interim guidelines put out by DeVos's agency state that "[a]ny rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms."¹⁶⁴ However, elsewhere, the interim guidelines state that if a school allows appeals from its decisions, "the school may choose to allow appeal . . . solely by the responding party."¹⁶⁵ Is that not a right or opportunity available to one party but not the other? Here, it is a right allowable to the accused predator but not to the alleged survivor of sexual

organization. *Id.* FIRE has been openly critical of the Obama Administration's standards for sexual assault policies. *Id.*; see also *U.S. Department of Education's Office for Civil Rights April 4, 2011, Guidance Letter Reduces Due Process Protections*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/cases/u-s-department-of-educations-office-for-civil-rights-april-4-2011-guidance-letter-reduces-due-process-protections/> [<https://perma.cc/5JET-9A35>]. In fact, the group sponsored a lawsuit by a student accused of sexual assault claiming the OCR's guidelines in handling sexual assault violated federal law. Susan Svrluga, *Former U-Va. Law Student Files Suit Challenging Federal Sexual Assault Directive*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/16/former-u-va-law-student-files-suit-challenging-federal-sexual-assault-directive/?utm_term=.aa20e0fefdf6#complaint [<https://perma.cc/EH99-A472>].

¹⁶¹ See Alanna Vagianos, *Betsy DeVos Says the Title IX System Has 'Failed' Both Survivors and the Accused*, HUFFPOST (Sept. 10, 2017), https://www.huffingtonpost.com/entry/betsy-DeVos-announces-she-plans-to-roll-back-title-ix-guidelines_us_59b14e36e4b0dfaafcf5dfeb [<https://perma.cc/ENQ7-NP5U>].

¹⁶² Benjamin Wermund, *DeVos To Scrap Obama-Era School Sexual Assault Policy*, POLITICO (Sept. 7, 2017), <http://www.politico.com/story/2017/09/07/betsy-DeVos-to-revamp-obama-era-schools-sexual-assault-policy-242444> [<https://perma.cc/D7W9-VVFD>] ("DeVos said in July . . . that 'it's clear that there are failings in this process. A system without due process protections ultimately serves no one in the end.'").

¹⁶³ DEAR COLLEAGUE LETTER, *supra* note 15, at 9–14 (discussing the "Prompt and Equitable Requirements" for Title IX investigations, which include equitable notice requirements, equitable access to information, and equitable appellate procedures); Dana Bolger & Alexandra Brodsky, *Betsy DeVos's Title IX Interpretation Is an Attack on Sexual Assault Survivors*, WASH. POST (Sept. 8, 2017), <https://www.washingtonpost.com/news/post-everything/wp/2017/09/08/betsy-DeVos-title-ix-interpretation-is-an-attack-on-sexual-assault-survivors/> [<https://perma.cc/S5W3-5PQQ>].

¹⁶⁴ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 4 (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/P6Y8-3SQS>].

¹⁶⁵ *Id.* at 7.

assault. DeVos explicitly criticized the Obama-era guidelines by stating “[t]he right to appeal may or may not be available to either party and no one is permitted to talk about what went on behind closed doors. It’s no wonder so many call these proceedings kangaroo courts.”¹⁶⁶ Yet, while the Obama-era guidelines explicitly stated that any appeals process must be available to both sides, her own guidelines allow this right to be afforded to only one party.¹⁶⁷

This appearance of favoring the accused is also displayed in her recent public statements regarding the issue. Recently, in a speech at George Mason University, she dedicated equal time to anecdotes about false accusations,¹⁶⁸ even though just between 2 and 10% of reported sexual assaults are factually proven to be false.¹⁶⁹ This gives a false appearance that there are as many wrongfully accused students as there are sexual assault survivors.¹⁷⁰ DeVos is not alone in publicly coloring the facts and minimizing the issue. Candace Jackson, who currently leads the OCR, flippantly told *The New York Times* that “90%” of accusations include situations where two people have consensual relations that one of them later regrets.¹⁷¹ This is obviously false. However, minimizing sexual assault and favoring the accused is not surprising coming

¹⁶⁶ Vagianos, *supra* note 161.

¹⁶⁷ Compare DEAR COLLEAGUE LETTER, *supra* note 15, at 12 (requiring appeals processes to be available to both parties), with OFFICE FOR CIVIL RIGHTS, *supra* note 164, at 7 (permitting schools to allow appeals only by responding parties).

¹⁶⁸ Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/> [<https://perma.cc/VJA6-DJ55>]; Vagianos, *supra* note 161.

¹⁶⁹ Vagianos, *supra* note 161; see also NAT’L SEXUAL VIOLENCE RESEARCH CTR., *supra* note 19, at 1.

¹⁷⁰ See Monte Whaley, *Campus Sex Assault Victims in Colorado Worry DeVos Policy Changes Will Impede Reporting*, DENVER POST (Oct. 25, 2017), <http://www.denverpost.com/2017/10/23/betsy-DeVos-title-ix-changes-campus-sexual-assault-victims-colorado/> [<https://perma.cc/566D-USMA>] (quoting a Denver Title IX working group as saying that “Secretary DeVos painted a false picture, indicating that the numbers of survivors and falsely accused parties is comparable This exploits the misconception that false accusations are common”); see also Wermund, *supra* note 162 (quoting Jess Davidson, managing director of End Rape on Campus, as saying that “I think there’s been a really concerning false equivalence of the concerns of survivors and the accused throughout this entire process with the Department of Education”).

¹⁷¹ Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-DeVos-title-iv-education-trump-candice-jackson.html> (on file with *Ohio State Law Journal*). Specifically, Jackson stated that in most investigations, there’s “not even an accusation that these accused students overrode the will of a young woman.” *Id.* Instead, she asserted “[r]ather, the accusations—90[%] of them—fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.’” *Id.*

from appointees of this Administration; we have all seen and heard the Access Hollywood tapes.¹⁷²

Notably absent from the interim guidance and DeVos's recent statements, however, is guidance related to amnesty clauses. This is curious considering amnesty clauses have developed recent traction and one would think an informed Secretary of Education would have something to say regarding the merit of such clauses. Furthermore, the existence of amnesty clauses does not cut against her initiatives, which are supposedly intended to make the process fairer to the accused.¹⁷³ Amnesty clauses would not take any rights away from an accused individual; they would only encourage reporting. Perhaps Josh Shapiro, Pennsylvania's Attorney General, said it best when he said that "Secretary DeVos should spend more time helping students learn and less time undermining their rights and safety."¹⁷⁴

Thus, with a slow-paced Congress and an unsupportive Secretary of Education, it may take a while for Congress to amend Title IX and protect students who come forward to report sexual assault. Therefore, until Congress acts, universities should work diligently to adopt these policy recommendations to remove this barrier to reporting sexual assault. To many universities' credit, schools are standing up to the Department of Education in the meantime and maintaining their conceptions of Obama-era guidance.¹⁷⁵ This is an impressive step, but universities should take this a step further and enact their own amnesty policies. If universities do not enact such policies, it may result in many more students getting in trouble for coming forward or who choose not to come forward out of the fear of university punishment. This deterrent to reporting sexual assault may lead to perpetrators never being held accountable for their actions. If more perpetrators are left unaccountable, the problem of sexual assault will likely continue. To avoid such a result, colleges should start acting now.

¹⁷² President Donald Trump was caught on a recording stating the following: "You know, I'm automatically attracted to beautiful—I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab 'em by the pussy. You can do anything." *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> (on file with *Ohio State Law Journal*).

¹⁷³ In her remarks at George Mason University, DeVos stated that "Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one. The notion that a school must diminish due process rights to better serve the 'victim' only creates more victims." Svrluga, *supra* note 168.

¹⁷⁴ Vagianos, *supra* note 161.

¹⁷⁵ Editorial Board, *Defying Betsy DeVos: Universities Refuse To Reform Their Policies on Sexual Assault*, WALL STREET J. (Oct. 8, 2017), <https://www.wsj.com/articles/defying-betsy-DeVos-1507489659> (on file with *Ohio State Law Journal*) (describing how just a few days after DeVos announced the Department of Education would rescind Obama-era guidance, at least a dozen schools have responded with defiance, potentially risking federal funding).

V. QUELLING POSSIBLE OBJECTIONS TO THE PROPOSED AMENDMENTS

Some may oppose these suggestions to remove the fear barrier, which prevents survivors and witnesses from reporting sexual assault. These potential critics may argue that these proposals may incentivize students to falsely claim sexual assault in order to avoid punishment from their drug and alcohol violations. However, research regarding false reporting should alleviate this concern.¹⁷⁶ These critics may also argue that being assaulted or witnessing an assault does not immunize a student from violating other campus policies, and thus students should still be punished regardless. Under typical circumstances, this is true. However, sexual assault is not a typical circumstance, and as the rules are currently structured, universities run the risk of not punishing anyone who violates campus policies, including the most serious offenders—sexual predators. These suggestions, if implemented, should remove a serious barrier to reporting sexual assault, a barrier that has resulted in more sexual predators not being held accountable for their actions.¹⁷⁷

A. The Proposed Policies Will Not Incentivize Students To Falsely Report Sexual Assault

Some may object to the proposal outlined above because students may claim a sexual assault took place to avoid punishment for violating campus policies. However, given the rarity of false reporting of sexual assault, such a concern would likely be misplaced.¹⁷⁸ While false reporting is difficult to measure, recent studies have found that only 2–10% of sexual assault reports are false reports.¹⁷⁹ The intrusive nature of sexual assault investigations for survivors

¹⁷⁶For a detailed examination of the research on false reporting see David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, Article in *16 Violence Against Women* 1318, SAGE JOURNALS 1330 (2010). In this article, the authors report the various rates at which prevailing research in the field of sexual assault has found reports to be false. These rates include: 2.1%, 2.5%, 3.0%, 5.9%, 6.8%, 8.3%, 10.3%, and 10.9%. *Id.*

¹⁷⁷See Richards & Palmer, *supra* note 99. The logical step is that with the removal of the fear barrier, more survivors will be willing to report assault. If more survivors are willing to report assault, then more predators will be held accountable, which should prevent future assaults.

¹⁷⁸Amy Nelson et al., *New Faculty Orientation: Discussion of Cultural Competency, Sexual Victimization, and Student Behaviors*, 47 J. CONTINUING EDUC. NURSING 228, 230 (2016) (“There is a societal misconception that students who report abuse are misconstruing facts or exaggerating, but the reality is that false reporting of rape is a rare event.”).

¹⁷⁹Lisak et al., *supra* note 176, at 1318. Lisak et al. note that variances in false reporting data may largely stem from the wide range of definitions used to define sexual assault. *Id.* at 1319. For this reason, they use the definition of false report articulated by the International Association of Chiefs of Police (IACP) that has been adopted by recent research. *Id.* The definition is as follows:

often comes with many traumatic side effects. Individuals likely are not willing to go through all of those side effects unless that accuser actually believes an assault took place.¹⁸⁰

However, while few reports turn out to be false reports, most actual sexual assaults go unreported.¹⁸¹ Nationally, around 60% of sexual assaults are never reported to the police;¹⁸² however, this number is even larger for campus sexual assaults where it is estimated that around 80% of sexual assaults are never reported to the police.¹⁸³ And, even though students have other resources to report assaults, such as a campus Title IX offices, the Department of Justice has found that only a small percentage of college survivors go to authorities other than the police.¹⁸⁴ Thus, given that assaults on college campuses are rarely reported, and given that false reports are even more rare, a concern that students will somehow cheat the system and report a sexual assault in order to avoid punishment for other campus policies is not likely a realistic concern.

B. Extraordinary Circumstances Like Sexual Assault Merit Unique Approaches

Others might object to these proposals because, even though survivors of assault experienced something traumatic, it does not remove the fact that they

The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. *This determination can be made only after a thorough investigation.* This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. *The determination that a report is false must be supported by evidence that the assault did not happen.*

Id. (quoting *Investigating Sexual Assaults*, IACP NAT'L L. ENFORCEMENT POL'Y CTR. (July 2005), <http://www.ncdsv.org/images/InvestigatingSexualAssaultsConceptsIssues.pdf> [<https://perma.cc/6UWK-89H6>]).

¹⁸⁰ A student who reports assault can expect questions inquiring into their drinking habits, kissing habits, sex habits, and even how they danced at a party. *See* Bogdanich, *supra* note 31. One student explained it this way, “[A]s if admitting you were grinding—a common way of dancing—‘means you therefore consent to sex or should be raped.’” *Id.* In addition to these intrusive questions, these investigations may involve rectal, vaginal, vulva, and cervical swabs, and “[n]ot to mention photographs of your private parts and dye injected into your vagina.” *Id.* Thus, these investigations are intrusive and a student is unlikely to want to go through this line of questioning and face such intimate physical examination unless it really happened.

¹⁸¹ *See* NAT'L SEXUAL VIOLENCE RESOURCE CTR., *supra* note 19, at 1; Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014), <http://www.pbs.org/newshour/rundown/four-five-acts-campus-sexual-assault-go-unreported-police/> [<https://perma.cc/7KUC-6NJS>].

¹⁸² *See* NAT'L SEXUAL VIOLENCE RESOURCE CTR., *supra* note 19, at 1.

¹⁸³ Hefling, *supra* note 181.

¹⁸⁴ *Campus Sexual Violence Statistics*, *supra* note 20 (explaining that only around 4% of all people who do not report sexual assault to police report it elsewhere).

violated campus policies and deserve punishment. Outside of sexual assault circumstances, violators of campus policies should be punished if those rules are to have any actual effect.¹⁸⁵ However, being sexually assaulted is an extenuating circumstance. In situations where a survivor might be punished for coming forward, the end result could be that no one gets punished for violating campus policies, including the sexual predator.

However, if a survivor knows she or he will not be punished after coming forward, then campuses increase the likelihood of finding and punishing the more serious and deserving offender. This is important considering the high rate at which unreported assaulters become repeat offenders.¹⁸⁶ The danger posed by undetected assaulters becoming repeat offenders outweighs the potential harm of a student receiving one-time immunity from campus drug and alcohol rules.

C. Other Objections Are Also Misplaced

Other objectors to the proposed policies may agree that sexual assault is a tremendous problem, but argue that individual schools are better equipped to handle the unique circumstances at their own schools—that unified policies encroach on universities’ abilities to effectively govern themselves.¹⁸⁷ However, the current state of affairs at colleges and universities nationwide dispels this suggestion. Currently, more than one out of five undergraduate women (23%) on college campuses are survivors of sexual assault during their undergraduate careers.¹⁸⁸ Not to mention, as of March 2017, over 230 private universities were under investigation by the federal government for possible noncompliance with Title IX.¹⁸⁹ Additionally, when students try to come

¹⁸⁵ See 151 CONG. REC. 10461 (2005) (“[A] law that is de facto unenforced may be treated as ineffective de jure as well.”).

¹⁸⁶ See David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002). Of the undetected rapists or attempted rapists in this study, “[63.3%] reported committing repeat rapes, either against multiple victims, or more than once against the same victim.” *Id.*

¹⁸⁷ Secretary DeVos may fall into this camp. In her confirmation hearing, referenced earlier, when first asked about sexual assault on college campuses, she said, “I agree with you that sexual assault in any form or in any place is a problem. No disagreement there.” *Education Secretary Confirmation Hearing*, *supra* note 156, at 1:17:13. While she was apprehensive to adopt federal policies regarding sexual assault, she also made it clear that she feels many matters are best left to the states. *Id.*

¹⁸⁸ DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 14 (Oct. 2017), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf [<https://perma.cc/QCP5-2MLR>].

¹⁸⁹ *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [<https://perma.cc/7QPY-V3D8>]. This link is to an interactive filter displaying all of the Title IX investigations that have been resolved and

forward to report sexual assault, some are punished after doing so.¹⁹⁰ Thus, under this regime of vague guidelines that has permeated Title IX,¹⁹¹ sexual assaults on college campuses have become rampant, campus responses have deterred students from coming forward, and the federal government has only offered intermittent guidance and mandates. Individual schools have shown they are unable to appropriately respond on their own.¹⁹² Simply, “[s]exual violence is out of control on college campuses and these institutions need strict procedures to follow to be able to appropriately respond to these types of claims.”¹⁹³

Amending Title IX to create uniform policies provides the best hope for handling the issue of sexual assault on college campuses, which includes removing barriers survivors face that keep them from reporting sexual assault. While survivors face many barriers to reporting assault, this Note focuses on one: the fear of being punished by the schools they attend. If Congress amends Title IX and forces schools to adopt the amnesty policies suggested in Part IV, this serious barrier to reporting sexual assault should be alleviated. Because individual colleges and universities have demonstrated incompetence in dealing with the issue, Congress must step in and help resolve the issue by amending Title IX.

VI. CONCLUSION

Many campus policies have the potential to silence survivors of sexual assault if it means survivors may receive punishment after coming forward.¹⁹⁴ Without these chilling policies, survivors already face many barriers to reporting sexual assault. While it should be entirely up to survivors whether or not they want to report an assault against them, it should be the job of those in power to remove as many barriers as possible so that a survivor’s decision to come forward is entirely their own and unencumbered by institutional obstacles. One important barrier that can easily be removed is the fear of punishment survivors have when they are deciding whether to come forward. To alleviate this fear and remove a serious barrier to reporting, Title IX should be amended to grant survivors and witnesses immunity from campus honor code policies if they come forward to report a sexual assault. Also, Title IX should be amended to

those that are currently under investigation. As of April 8, 2018, 121 cases of mishandled reports have been resolved, and 337 remain open at universities across the country. *Id.*

¹⁹⁰ See Healy, *supra* note 1 (detailing the stories of Madi and Brooke).

¹⁹¹ See Walker, *supra* note 115, at 9 (“The Office for Civil Rights at the Department of Education (“OCR”) has promulgated vague guidelines identifying ‘a number of elements [used] in evaluating whether a school’s grievance procedures are prompt and equitable.’” (alteration in original) (quoting OFFICE FOR CIVIL RIGHTS, *supra* note 153)).

¹⁹² See Smith, *supra* note 109, at 157.

¹⁹³ *Id.* at 177.

¹⁹⁴ See, e.g., DEAR COLLEAGUE LETTER, *supra* note 15, at 15; see also Healy, *supra* note 1; Webster, *supra* note 14 (accounting a story of Baylor University students receiving suspension after reporting sexual assault).

require that Title IX offices and student conduct offices occupy separate physical spaces, operate independently, and do not share information between offices. The commingling between these two offices can lead to improper handling of survivors' cases and create an appearance of impropriety. These changes should lessen at least one of the major barriers that survivors face when choosing to report an assault. More likely than not, if this barrier is alleviated, more survivors will be willing to come forward, which should result in more violators being held accountable.¹⁹⁵

¹⁹⁵ See Richards & Palmer, *supra* note 99.